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In the Supreme Court of the United States

October Term, 1942

OSAGE TRIBE OF INDIANS AND FRED LOOKOUT, Principal Chief and Member of the Osage Tribe of Indians, on Behalf of Said Tribe and the Members Thereof,

Petitioners,

vs.

HAROLD L. ICKES, Secretary of the Interior of the United States, and TOM H. FRALEY, Treasurer of Osage County, Pawhuska, Oklahoma,

Respondents.

BRIEF OF TOM H. FRALEY, COUNTY TREASURER OF OSAGE COUNTY, OKLAHOMA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

BRIEF OF TOM H. FRALEY, COUNTY TREASURER OF OSAGE COUNTY, OKLAHOMA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

RULE OF THE COURT

Section 5 of Rule 38 of the Rules adopted February 13, 1939:

"A review on a writ of certiorari is not a matter of right, but of sound judicial discretion, *and will*

be granted only where there are special and important reasons therefor."

There is no special or important reason therefor in this case.

II.
THE QUESTION INVOLVED

The question presented is whether or not the action was properly dismissed.

This involves a determination of the question as to whether or not the United States was an indispensable party to the suit, and petitioners contend that it should involve a determination of the question as to whether or not Section 5 of the Osage Act of March 3, 1921 (41 Stat. L. 1249) was unconstitutional.

III.
STATEMENT OF THE CASE

An accurate concise statement is contained in the opinion of Mr. Justice Miller for the Three-Judge Court reported 45 Fed. Sup. 179.

IV.
SUMMARY

The application for writ of certiorari should be denied for these reasons:

1. The United States is an indispensable party.

(a). The United States is trustee in possession of the fund and is guardian of the Osage Indians and is acting under authority of Congress. The acts performed or anticipated by the Secretary

of the Interior are not his acts but the acts of the United States itself under authority of and by direction of Congress. If those acts are wrongful or unlawful, it is the United States and not the Secretary who is liable and responsible.

(b). Counsel for petitioners freely admitted in their oral argument before the Court of Appeals and also before the Three-Judge Trial Court the pendency of their action before the United States Court of Claims to recover from the United States the sum of $1,092,338.17 and about three-quarter million dollars in interest thereon, by reason of payments theretofore made by the United States for the construction of roads and bridges in the Osage Indian Reservation which payments had been made by reason of and under the terms of the questioned act. (In the Court of Claims of the United States, Congressional No. 17, 763, THE OSAGE TRIBE OF INDIANS, Plaintiff, v. THE UNITED STATES, Defendant). Counsel also admitted their desire to secure in this action an adjudication of the unconstitutionality of the questioned act to be used by them in their suit against the United States before the Court of Claims. The actual vital interest of the United States in this action therefore becomes an admitted fact.

(2). The suit on its face involves only $1,535.70 and less than the amount over which the federal courts will ordinarily take jurisdiction.

(3). The petitioners have an adequate remedy at law and should not be permitted to maintain this action

in equity. They could very easily add the $1,535.70 to the $1,092,338.17 and interest, which they are seeking to recover from the United States in their pending action in the Court of Claims, if the United States should pay out the $1,535.70 in compliance with the direction of Congress.

(4). The act complained of is constitutional whether regarded:

(a). As a disbursement of Indian funds by the United States for the benefit of the Indians, or,

(b). As a tax upon their property.

V.
PETITIONERS' ERRORS

1. Petitioners erroneously assume that they should be entitled to secure an adjudication which would have the effect of fixing liability against the United States for a sum in excess of one million dollars and interest without the presence of the United States as a party to that suit.

2. The petitioners overlook or disregard the plenary power of Congress over the Indians and their property, and

3. Erroneously assume confiscation and spoliation of the Indians' money while alleging the use of the money for the construction of roads and bridges on the Osage Indian Reservation.

VI.
THE QUESTIONED ACT

Section 5 of the Act of March 3, 1921, (41 Stat. L. 1249):

"Sec. 5. That the State of Oklahoma is authorized from and after the passage of this act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and all taxes so collected shall be paid and distributed, and in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, the Secretary of the Interior is hereby authorized and directed to pay, through proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, the per centum levied as gross production tax, to be distributed as provided by the laws of Oklahoma; provided, that the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to Osage County, Oklahoma, an additional sum equal to 1 per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein; provided further, that the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only."

VII.
ARGUMENT

1.
The United States Is An Indispensable Party To This Action

The United States actually holds the legal title to the minerals from which the royalties accrue in trust for the Osage Tribe. The lands, including the minerals thereunder, were conveyed to the "United States of

America in trust for the use and benefit of the Osage Indians" under authority of the Act of Congress of March 3, 1883 (22 Stat. L. 603). Under the Osage Act of June 28, 1906, sub-section 7 of section 2, the minerals were reserved for the use of the Tribe, the title remaining in the United States. By later acts the minerals are still so reserved and the United States still holds the legal title to them in trust for the Osage Indians.

The act of June 28, 1906, provided for the leasing of those lands for the discovery and development of oil.

The funds owned by the Osage Tribe were segregated by the provision of the Osage Act of June 28, 1906, commonly called the Allotment Act. The minerals were not segregated and could not be alienated by any one without further authority from Congress, which has never been granted, except as to the leasing for development.

The legal title to the minerals still remains in the United States.

The first paragraph of Section 4 of the same Allotment Act reads as follows:

> "Sec. 4. That all funds belonging to the Osage Tribe, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said Osage tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided."

By Section 1 of the Act of March 3, 1921, the mineral trust period was extended to April 8, 1946.

By Section 1 of the Act of March 2, 1929, the trust period was further extended to April 8, 1958.

There is no allegation in the complaint that the $1,092,338.17 was not used for the construction of roads and bridges in the Osage Reservation and there is no allegation that the $1,535.70 will not be so used. The only thread upon which the petitioners' whole case hangs is the untenable contention that Congress cannot use tribal funds to construct roads and bridges on the tribal reservation, which contention finds no support in any case cited by the petitioners or in any case which we have been able to find in the books. In fact, the only way the allegations of the complaint attempt to support the contention is by calling the expenditures confiscation and spoliation, and at the same time admitting, as they must admit, that the expenditure was for roads and bridges with an obligation on the part of the United States to see that the money was so expended.

The interest of the United States in these royalties is much deeper than that of an ordinary trustee in possession:

1. The United States is interested in and responsible for the welfare of the Indians and of their property. The United States is the guardian of the Indians and of their property; it has assumed the responsibility of looking after the Indians and their property, of determining on its own exclusive responsibility what is for the best interest of the Indians and just how their funds are to be expended to further that best interest. Neither the Indians, nor the state, nor the courts have

any authority in the matter. The use to be made of these royalties is a matter for the United States and the United States alone to determine. There is no power on earth which can question the authority or wisdom of whatever action the United States might take with reference thereto so long as there has not been confiscation or spoliation of that property.

2. The United States is interested in the disbursement of this $1,535.70 for it was still the responsibility of the United States and of the United States alone, to determine how the $1,535.70 should be expended.

3. The United States is interested in the determination of the question of the constitutionality of the provisions of the act being attacked for thereby hangs the determination of the question as to whether or not the United States should be held liable for the repayment to the Osage Tribe of $1,092,338.17 and interest thereon. The United States has allowed itself to be sued in the Court of Claims for the return of this fund and the petitioners have taken advantage of that opportunity, but here they are admittedly seeking an adjudication that the United States is liable in the absence of the United States as a party to the litigation.

The case of *Morrison* v. *Work*, 266 U. S. 481, 69 L. Ed. 394, is conclusive against the right of the petitioners to maintain this action without making the United States a party.

The analogy in that case to the present situation is close, if not exact.

There the property involved was tribal property held in trust by the United States.

Here it is tribal property held in trust by the United States.

There and here the United States acted as "guardian for the Indians" and as "trustee in possession."

There the four grounds of complaint were that the Secretary of the Interior by carrying out the provisions of six acts of Congress had subjected the Chippewas to great loss and threatened further injury, and that the six acts of Congress were void because they deprived the Chippewas of property in violation of the Constitution.

Here it is the contention that the Secretary of the Interior has injured the petitioners by paying out money as authorized by Congress and threatens further to injure them by paying out $1,535.70 more in violation of the Constitution.

In regard to those four grounds of complaint in the Morrison case the Supreme Court said (page 397 of 69 L. Ed.):

> "The claim of the United States is, at least, a substantial one. To interfere with its management and disposition of the lands or the funds by enjoining its officials would interfere with the performance of governmental functions, and vitally affect interests of the United States. It is, therefore, an indispensable party to this suit. It was not joined as defendant. Nor could it have been, as Congress has not consented that it be sued. The bill, so far as it complains of acts done pursuant

to the later legislation, was properly dismissed for this reason, among others."

The petitioners seek comfort from the following language in the opinion in the Morrison case (page 397 of 69 L. Ed.):

> "The case at bar is unlike those in which relief by injunction has been granted against the head of an executive department, or other officer of the government, to enjoin an official act on the ground that it was not within the authority conferred, or that it was an improper exercise of such authority, or that Congress lacked the power to confer the authority exercised."

But notice the next statement in the opinion (page 397 of 69 L. Ed.):

> "In those cases the act complained of either involved an invasion or denial of a definite right of the plaintiff, or it operated to cause a cloud upon his property. In some of these cases the defendants would have been liable individually in trespass unless he could justify under authority conferred."

Notice that before an injunction will issue against an officer of the right of the plaintiff must be "definite," and we would say, not dependent upon the court determining that the act authorizing the conduct is unconstitutional. The court did so definitely decide in its decision with reference to the four grounds of complaint.

Then notice this further statement in the Morrison case (p. 398 of 69 L. Ed.):

> "If through officials of the United States these lands, or the proceeds thereof, or the accruing interest, are improperly disposed of, *it is the United*

States, not the officials, which is under obligation to account to the Indians therefor. In other words, the right of the Indians is merely to have the United States administer properly the trust assumed. It resembles the general right of every citizen to have the government administered according to law and the public moneys properly applied. Courts have no power, under the circumstances here presented, to interfere with the performance of the functions committed to an executive department of the government by a suit to which the United States is not, and cannot be made, a party."

The petitioners are accusing the United States of improperly administering a trust. They seek to obtain an adjudication to that effect without making the United States a party, yet, if there is liability, it is the United States and not the trust officer of the United States who is liable.

Here and in the Morrison case it is not merely a question of an administrative official exceeding his authority. From such conduct he might be enjoined, but here and in the Morrison case the attempt is to enjoin an alleged unlawful act and to affix the liability on the United States, which is not a party to the suit. To state it still differently, it is not merely an administrative matter which the petitioners seek to control, but it is a trusteeship. It is a fiduciary matter, in which the fiduciary may be called upon to account, if he has violated the trust. The fiduciary is a necessary party to any suit which would control his conduct or affix him with liability.

See *Thayer* v. *Life Association of America*, 112 U. S. 717, 28 L. Ed. 864.

In the case of *Miles* v. *Caldwell*, 2 Wall. 35, 17 L. Ed. 755, and many times since, this expression has been used:

> "Courts of equity are not restrained by technicalities, but look past the nominal parties to the real parties."

The real defendant here is the United States, who cannot be made a party defendant.

In view of the frank admission in open court of the attorneys for the petitioners that they seek to obtain here an adjudication of unconstitutionality in order to use the judgment to sustain their suit against the United States in the Court of Claims, it would seem that this Court in its decision here could find and hold that the real purpose of this suit is as admitted by counsel for petitioners, but in any event the bill alleges illegal payment to the County of Osage in the sum of $1,092,338.17 and as the United States is, and was, the trustee of that fund, the Court must conclude, as did the Supreme Court in the Morrison case, that, if the officials have acted erroneously, it is the United States and not the official which is under obligation to account.

We invite the Court's attention to this language in the case of *Louisiana* v. *McAdoo*, 234 U. S. 627, 58 L. Ed. 1507:

> "That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on the record, *but by the effect of the judgment or decree which can here be rendered. Minnesota* v. *Hitchcock*, 185 U. S. 373, 387, 46 L. Ed. 954, 962, 22 Sup. Ct. Rep. 650; *Kansas* v. *United States*, 204 U. S. 331, 333, 51 L. Ed. 510, 27 Sup. Ct. Rep. 388."

To the same effect see *Wells* v. *Roper*, 246 U. S. 335, 38 S. Ct. 317, 62 L. Ed. 775; *Transcontinental & Western Air* v. *Farley*, 71 Fed. (2d) 288; *In re: Ayers*, 123 U. S. 443, 8 S. Ct. 164, 31 L. Ed. 216.

The following is from *Belknap* v. *Schild*, 161 U. S. 10, 16 S. Ct. 443, 40 L. Ed. 599:

> "(P. 602). But no injunction can be issued against officers of a state, to restrain or control the use of property already in the possession of the state, or money in its treasury when the suit is commenced; or to compel the state to perform its obligations; or where the state has otherwise such an interest in the object of the suit as to be a necessary party. *Louisiana* v. *Jumel*, and *Elliott* v. *Wiltz*, 107 U. S. 711, 720, 728 (27:448, 451-454); *Cunningham* v. *Macon & B. R. Co.*, 109 U. S. 446, 454-457 (27: 992, 995, 996); *Hagood* v. *Southern*, 117 U .S. 52, 70 (29:805, 811); *Re: Ayers*, 123 U. S. 441 (31:216); *North Carolina* v. *Temple*, 134 U. S. 22 (33:849); *McGahey* v. *Virginia*, 135 U. S. 662, 684 (34:304, 312)."

It seems to us that the petitioners are in the very inconsistent position of asking this Court to determine that section 5 of the Act of Congress of March 3, 1921, is unconstitutional, which, at least according to their contention, will create the foundation for liability of $1,092,338.17, and interest, against the United States, and at the same time they insist that the United States is not a necessary party to this litigation.

How can the Court fail to hold that the United States is so directly involved that it is the real party in interest? Certainly, if the relief, which is sought, should be granted, the judgment would operate against the sovereign.

The case of *Ickes* v. *Fox*, 300 U. S. 82, 81 L. Ed. 525, quoted from by the petitioners is not in point. There it was contended that the United States was an owner of the water rights involved and was, therefore, a necessary party to the suit. The Supreme Court found that the United States did not own the water rights; that they were "appurtenant to the land irrigated," and that the water rights belonged to the respondents (the land owners); that the ownership was in them and "not in the United States." Hence, the United States was not a necessary party to the suit. It was further found and held that the secretary was endeavoring to carry out an order which would deprive the land owners of vested rights, and that an officer is not protected from "personal liability" to persons whose rights of property he has wrongfully invaded, and that consequently the invasion might be stopped without making the United States a party to the suit.

In the case at bar no personal liability could attach to the Secretary of the Interior and the United States does have a substantial interest in these trust funds.

Petitioners have quoted from the case of *Barr* v. *Rhodes*, 35 Fed. Supp. 223, but did not quote the following portion of the opinion (page 225):

> "(5, 7). The rule seems to be that the courts will not interfere with matters entrusted by Congress to the discretion of the heads of executive departments of the government, but that they will enjoin acts which are beyond the scope of statutory authority or jurisdiction of executive officers."

In the case at bar it is not the act of an officer of which the petitioners complain, but it is the acts of the

United States itself in using the royalties for the construction of roads and bridges and in directing the Secretary of the Interior to see that they are so used; so that it is the United States itself which is interested in the litigation and not merely an administrative official.

The case of *Banco de Espana* v. *Federal Reserve Bank*, 114 Fed. (2d) 438, is no help to the petitioners. There it was held that the United States Lines Company and the Federal Reserve Bank could be sued because:

> "(Page 448) One was a common carrier sued for damages for making a claimed illegal disposition of the plaintiff's property. The other was an independent corporation which had obtained possession of the plaintiff's property and allegedly had wrongfully disposed of it. Both were sued for damages. Judgment should go in their favor on the merits."

It was then held that Solomon, the Superintendent of the United States Assay Office, could not be sued for he was custodian of the silver for the United States:

> "In the case of Solomon, however, the evasion of the ordinary rule of immunity seems too direct to be countenanced, for he was at most a mere custodian of the property for the United States. Under the law and the specific instruction given him in these particular instances, his duties were only ministerial."

The case of *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570, was a suit to restrain a criminal prosecution. In the opinion it is said, on page 576:

> "The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded."

It has been pointed out that in the case at bar the Secretary could not be personally liable for it is the conduct of the United States which the petitioners have challenged. They contend that the use of the money for the construction of roads and bridges for the Osage Tribe is not lawful because Congress did not have power to direct that to be done. Congress, however, did direct it and the executive branch of the government carried out that direction. Now if that conduct were prohibited by the Constitution it is the United States who wrongfully paid out the money and it is the United States which must suffer. Then certainly the United States has a right to be heard in any action which seeks to determine that the act in question is unconstitutional.

When a judgment would affect the interest of the United States the United States is an indispensable party. Even if the United States is not a party to the suit, but its interest is so involved that it is the real party in interest the suit may not be maintained. The United States must be made a party in determining the question as to whether or not the authorty under which the Secretary acted was legally conferred because the United States would be adversely affected by a judgment holding that the authority was not legally conferred.

We quote from *Transcontinental & Western Air, Inc.*, v. *Farley*, 71 Fed. (2d) 288, wherein it is said, (p. 290):

> "(1, 2) At the outset, we must consider an initial inquiry, and that is whether this suit is one against the United States. If the interest of the United States is substantially affected, the suit can-

not be maintained, since the United States cannot be made a party to such a suit without its consent. *U. S. ex rel. Goldberg* v. *Daniels*, 231 U. S. 219, 34 S. Ct. 84, 58 L. Ed. 191. The determinative factor is the effect of the judgment. *Louisiana* v. *McAdoo*, 234 U. S. 627, 34 S. Ct. 938, 58 L. Ed. 1506. Even though the United States is not joined as a formal party defendant, if its interest is so directly involved that it is the real party in interest and any relief that might be given in such a suit will operate against the sovereign, it is an indispensable party, and the suit cannot be maintained. *Morrison* v. *Work*, 266 U. S. 481, 45 S. Ct. 149, 69 L. Ed. 394; *Wells* v. *Roper*, 246 U. S. 335, 38 S. Ct. 317, 62 L. Ed. 755; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 24 S. Ct. 820, 48 L. Ed. 1134; *Belknap* v. *Schild*, 161 U. S. 10, 16 S. Ct. 443, 40 L. Ed. 599."

A judgment favorable to the petitioners would operate against the United States in that the Court would be determining for the United States the policy which the United States must follow with reference to the Indians and their property, which is the specific duty and obligation of the United States alone; it would operate against the United States by prohibiting the disbursing of these royalties in the manner in which the United States had determined they should be used; it would operate against the United States by establishing a liability against the United States in favor of the petitioners in the amount of $1,092,338.17 and interest, and it would operate against the trusteeship of the United States for the Indians and their property, which is operating against the United States.

The case of *Minnesota* v. *United States*, 305 U. S. 382, 83 L. Ed. 235, says that (2nd syllabus):

> "A proceeding against property in which the United States has an interest is a suit against the United States."

In the course of the opinion in the Minnesota case, which deals with Indian lands held in trust by the United States, the Court said:

> "As the parcels here in question were restricted lands, the interest of the United States continues throughout the condemnation proceedings. In its capacity as trustee for the Indians it is necessarily interested in the outcome of the suit—in the amount to be paid. That it is interested, also, in what shall be done with the proceeds is illustrated by the Act of June 30, 1932, chap. 333, 47 Stat. at L. 474, 25 U. S. C. A. sec. 490a, under which the Secretary of the Interior may determine that the proceeds of the condemnation of restricted Indian lands shall be reinvested in other lands subject to the same restrictions."

The United States in this Osage case is trustee in possession of the $1,535.70 and is directly responsible for its proper disbursement and is, therefore, interested in any suit which seeks to direct how, when or in what manner said funds shall be disbursed, or whether or not they shall be disbursed at all.

The United States has determined upon a policy calling for the use of this $1,535.70 for the construction and maintenance of roads and bridges in the Osage Reservation. The petitioners say that that policy is wrong and that it contravenes the Constitution and cannot be carried out. The United States is interested in the result in order that it may know whether or not its trusteeship is so hampered and limited. Even if petitioners

are right as to what use may be made of the money, it is still the United States which is interested and not the Secretary for the policy was not adopted by the Secretary, but by the United States.

2.

The Petitioners Have An Adequate Remedy At Law And Should Not Be Permitted To Maintain This Action In Equity

Section 267 of the Judicial Code, which is section 384, Title 28 USCA, provides that suits in equity shall not be maintained in any case where a plain, adequate and complete remedy may be had at law.

The Supreme Court of the United States in the case of *Henrietta Mills* v. *Rutherford County*, 281 U. S. 121, 50 S. Ct. 270, 74 L. Ed. 737, fully sustains this rule and statute on which it is based and states that "the prohibition is not to be disregarded."

As the petitioners have already brought a suit before the Court of Claims they are not in position to claim that the remedy is not complete or adequate.

3.

The Act Complained Of Is Constitutional

It is our view that the 1% payment from the royalty for roads and bridges was a provision made by Congress for the benefit of the Osages, just as Congress, throughout the history of governmental relations with the Indians, has provided for the construction of schools, churches, agency buildings, blacksmith shops, hospitals

and the like, with tribal funds, and just as Congress has used tribal funds for the maintenance of schools, Indian police and administration of Indian affairs by the employment of Indian agents and clerical forces. We think a complete detail history of the Indian tribal funds would show numerous instances of construction and maintenance of roads upon their reservations from those funds.

If this 1% payment is a tax, there can be even less grounds for complaint against it, for we believe it is admitted that Congress may determine when the property of the Indian may be taxed, and the Supreme Court has by a number of decisions, some of them quite recent, precluded the possibility of this 1% payment being condemned as a prohibited method of taxation.

The allegations of the bill itself refute the alleged conclusions that the 1% is confiscatory. In the first place a tax of 1% could not be confiscatory for there remains the 99%, and while $1,000,000.00 was being expended for the construction of and maintenance of roads and bridges there remained $99,000,000.00 which was not so used and which was paid to the Osages or held by the United States in trust for them. With the State of Oklahoma being paid 3% until 1935 and then 5% until 1940, there still remained to be paid to the Osages between $94,000,000.00 and $96,000,000.00 during the time that the $1,000,000.00 was being used for the construction of roads and bridges in their reservation.

In the case of *British-American Oil Producing Company* v. *Board of Equalization of the State of Montana*, 229 U. S. 159, 81 L. Ed. 94, the Supreme Court of the United States held, or rather assumed, that Congress had the power to authorize the State of Montana to levy a gross production tax on the oil and gas of the Blackfeet Indians in the State of Montana.

(a). The Plenary Power of Congress In Indian Matters

The United States Government has undertaken the responsibility of looking after the Indians and their property.

While the United States is the trustee of the Indian tribal property, it has, by the very nature of the trust, assumed greatly enlarged powers from those of an ordinary trustee. The United States is not only the trustee of the property, but it is also the guardian of the Indians with the duty and power of using its best judgment in the handling of the Indians' property for their best interest, and the court will not inquire as to whether or not the judgment of Congress in any particular matter has been good or bad. Their sole inquiry is as to whether or not the will of Congress has been carried out, and, if so, the courts do not interfere with the guardianship or with the administration of the trust.

The home of the Osage tribe was Osage County. The Osages lived there. They had selected homestead allotments all over the county. They were rapidly developing the minerals, which required extended hauling

of heavy machinery and equipment all over the county and often times to the most inaccessible places. We may assume that the Court will take judicial knowledge of the fact that Osage County is traversed by many streams, and that automobiles were coming into general use at the time of the enactment of this legislation and that the Osage Indians with their income had automobiles.

The 1% was not confiscated or appropriated by the Government. It was not given to any one. Congress provided for its use for the construction of roads and bridges and for an accounting to see that it was so used.

We direct the Court's attention to the case of *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 L. Ed. 299. From the statement of the facts in the opinion it appears that the Kiowa and Comanche Indians had 350,000 acres of mountainous lands and 2,150,000 acres of lands suitable for farming and grazing.

Over the protest of the Indians Congress in 1900 provided for allotment of not over 320 acres of land to each male Indian of 18 years of age or over (it appearing that there were about 725 of them) and provided further for the setting aside of 480,000 acres for the use in common of the Kiowas, Comanches and Apaches, confirmed title in religious and educational associations to the lands occupied by them, and provided for payment to the Indians of $1.00 per acre for the remaining lands and settlement of those lands by whites. Lone Wolf and others contended that the Act of Con-

gress was unconstitutional; that the tribal lands were worth $2.50 an acre; that the act violated the treaties of the Tribe; that it was a taking of their lands for the whites without due process of law. A permanent injunction against the enforcement of the act was prayed for. We quote from 47 L. Ed. 299:

> "Syllabus. The *Plenary power* of Congress over the tribal relations *and lands* of the confederated tribes of Kiowa, Comanche, and Apache Indians could not be so limited by any of the provisions of a treaty with such Indians as to preclude the enactment by Congress of the act of June 6, 1900 (31 Stat. at L. 677, chap. 813), providing for allotments to the Indians in severalty out of the lands held in common within the reservation, and purporting to give an adequate consideration for the surplus lands, not allotted among the Indians or reserved for their benefit.
>
> "(From opinion p. 306). That Indians who had not been fully emancipated from the control and protection of the United States are subject *at least so far as the tribal lands were concerned*, to be controlled by direct legislation of Congress, is also declared in *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, 30 L. Ed. 306, 314, 7 Sup. Ct. Rep. 75, and *Stephens* v. *Choctaw Nation*, 174 U. S. 445, 483, 43 L. Ed. 1041, 1054, 19 Sup. Ct. Rep. 722.
>
> "In view of the legislative power possessed by Congress over treaties with the Indians and Indian tribal property we may not specially consider the contentions pressed upon our notice, that the signing by the Indians of the agreement of October 6, 1892 was obtained by fraudulent misrepresentations, and concealment, that the requisite three-fourths of adult male Indians had not signed, as required by the twelfth article of the treaty of 1867, and that the treaty as signed had been amended by

Congress without submitting such amendments to the action of the Indians, *since all these matters, in any event, were solely within the domain of the legislative authority, and its action is conclusive upon the courts.*

"The act of June 6, 1900, which is complained of in the bill, was enacted at a time when the tribal relations between the confederated tribes of Kiowas, Comanches, and Apaches still existed and the statute and the statutes supplementary thereto dealt with the disposition of tribal property and purported to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit. Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation* v. *Hitchcock*, 187 U. S.294, ante, 183, 23 Sup. Ct. Rep. 115, decided at this term, where it was held that *full administrative power was possessed by Congress over Indian tribal property.* In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. *In any event, as Congress possessed full power in the matter,* the *judiciary cannot question or inquire into the motives which prompted the enactment of the legislation.* If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained."

To the same effect see *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 47 L. Ed. 183, wherein it is held

that the United States had properly assumed full control over the Cherokees and took upon itself a determination of membership in the tribe for the purpose of adjusting their rights in *"tribal property."*

> "(From opinion p. 183) *The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate,* as it had done through the act of 1898, directly for the protection of the *tribal property,* was in that case reaffirmed."

In *Re: Heff,* 197 U. S. 488, 49 L. Ed. 848, 25 S. Ct. 506, it was held that it was not within the power of the courts to overrule the judgment of Congress and that when the purpose of Congress had been made clear by its legislation *"the question is at an end."*

In *United States* v. *Kagama,* 118 U. S. 375, 30 L. Ed. 228 it was held that the Indians and their property are necessarily subject to the laws which Congress may enact for their protection *"and for the protection of the people with whom they come in contact."* It was further said that:—*"The soil* and the people within these limits are under the political control of the government of the United States."

In *Williams* v. *Johnson,* 239 U. S. 414, 36 S. Ct. 150, 60 L. Ed. 358, it was held that Congress has "plenary" control over the tribal relations and *"property"* and that this power continues after the Indians are made citizens.

To the same effect see *Barker* v. *Harvey,* 181 U. S. 481, 21 S. Ct. 690, 45 L. Ed. 963, and *Walker* v. *Brown,* 43 Okla. 144, 141 p. 681.

There is no question of the taking of property without due process of law; there is no question of the taking of property. None is being or has been taken. One per cent of the royalty has been expended under and by virtue of the authority and directions of Congress for the construction and maintenance of roads and bridges in the county where the Osages live, where the minerals were being developed, where the Osages were driving thir automobiles to and from their homes, and where they were in the pursuit of welfare and happiness. It must be presumed that Congress acted in good faith and the courts will not question the wisdom of Congress in its determination as to what was for the benefit of the Osage tribe.

The case of *United States* v. *Creek Nation*, 298 U. S. 103, 79 L. Ed. 1331, does not present an analogy to the situation here.

There the Creek Nation ceded one-half of its lands to the United States for the Sac and Fox Indians. The dividing line was surveyed and division was established and agreed upon by the Creeks and the Government. Later surveys included 5575.57 acres of Creek lands within the Sac and Fox area, but the Government accepted and approved these later erroneous surveys and sold the 5575.57 acres of Creek lands and deposited the proceeds of the sales in the Treasury of the United States as public money. That was a Court of Claims action and it was agreed in the trial of that case that the United States had appropriated or confiscated the land.

The Supreme Court held that this action on the part of the United States was not control and manage-

ment of the Creek property, but was a confiscation of it. The court said that the power of the United States over the Indians and their property "did not enable the United States to give tribal lands to others, or to appropriate them to its own purposes, without rendering or assuming the obligation to render, just compensation for them; for that would not be an exercise of guardianship, but an act of *confiscation.*"

There was no act of Congress providing for the appropriation of the Creek lands. It was simply an error in the administration and hence does not involve the authority of Congress.

In the case at bar Congress did not give the one per cent of the royalties to others, or appropriate it to its own use, but provided for its expenditure by its agency, Osage county, for the benefit of the Osages themselves.

The case of *Shoshone Tribe* v. *United States,* 229 U. S. 476, 81 L. Ed. 360, is another Court of Claims case. The complaint is against the United States for having appropriated for the Northern Arapahoes one-half of the Shoshones' reservation contrary to the treaty provisions with the Shoshones. This was also an act of administration. In fact the Arapahoes were moved in on the Shoshones under army escort. It really amounted to the taking by force of a part of the Shoshone reservation although Congress some years later recognized the Arapahoes as having equal rights in the reservation with the Shoshones. The result was that the United States just took one-half of the Shoshone reservation away from them and gave it to the Arapahoes. Congress then in 1927 provided for this action in the Court of Claims.

The Supreme Court called the taking "spoliation" which very clearly distinguishes it from the case at bar. We quote from the opinion p. 369 of 81 L. Ed.:

> "Power to *control and manage* the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 564-566, 47 L. Ed. 299, 305, 306, 307, 23 S. Ct. 216. The power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation * * *; for that "would not be an exercise of guardianship but an act of confiscation".' *United States* v. *Creek Nation*, *supra*, (295 U. S. 110, 79 L. Ed. 1335, 55 S. Ct. 681); * * * The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only but it is 'as sacred as that of the United States to the fee.' *United States* v. *Cook*, *supra* (19 Wall. 593, 22 L. Ed. 211); *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 L. Ed. 299, 23 S. Ct. 216, *supra*; *Choate* v. *Trapp*, 224 U. S. 665, 671, 56 L. Ed. 941, 944, 32 S. Ct. 565; *Yankton Sioux Tribe* v. *United States*, 272 U. S. 351, 71 L. Ed. 294, 47 S. Ct. 142, *supra*. *Spoliation is not management.*"

In *Chippewa Indians* v. *United States*, 301 U. S. 358, 81 L. Ed. 1156, it was decided as a question of fact that the Red Lake Reservation in Minnesota had always belonged to the Red Lake Band of Chippewa Indians and not to the entire tribe of the Chippewas and that the Government had for years so considered. Then the question was whether or not under the Chippewa Allotment Act, Congress had intended to consider the Red Lake Reservation as belonging to the entire tribe or just to the Red Lake Band. The Court decided that Con-

gress had intended to recognize that the Red Lake Reservation belonged to the Red Lake Band and that it was to be handled for their benefit and not for the benefit of the entire Chippewa Tribe.

The Court said any other construction of the Act would be taking the Red Lake Reservation from the Red Lake Band and giving it to the entire Tribe, which could not be done for the property of an Indian band or tribe cannot be taken from it and given to another band of the tribe. This language is used: (p. 1167 of 81 L. Ed.)

> "Our decision, while recognizing that the Government has power *to control and manage the property* and affairs of its Indian wards in good faith for their welfare, show that this power is subject to the constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own."

No act of Congress was held invalid in any of those three cases relied upon by the petitioners. The acts complained of were all administrative. The Interior Department had exercised its authority and had dealt arbitrarily and capriciously with tribal property; had actually confiscated it for the benefit of the United States itself in the one instance and for other tribes in the other instances.

From consideration of these authorities it is apparent that the petitioners are asking this Court to hold that Congress had in this instance confiscated one percent of the royalty; that spoliation has been committed, but this Court will not question the good faith of Congress or its wisdom. That Congress did not intend confiscation or spoliation is evident from the language of

the Act itself, which provided for the expenditure of one percent of the royalty produced in Osage county, and provided for an accounting by the agency authorized to do the spending; so that it might be seen that the one percent was expended as authorized.

It requires no strained retrospect to understand and appreciate that Congress believed those expenditures to be beneficial to the Osages from the standpoint of the development of their property, and it requires only a cursory knowledge of the present to know that the expenditure was so beneficial to the Osages. Certainly no court could just merely assume that it was not and thereby declare the Act confiscation and spoliation.

And it makes no difference that Osage county, Oklahoma, was to build the roads and bridges. Congress could as well have directed the Secretary of the Interior to build them, but in its wisdom it chose Osage County and the county was merely an agency of Congress or of the United States Government in fulfilling the requirements of Congress. We find an analogy in Oklahoma as to such agency for the Government.

Congress has at times designated the County Courts of Oklahoma to act in certain capacities and one of them was to approve certain conveyances of the members of the Five Civilized Tribes and the courts have held that the County Court, when acting in such capacity, was merely the ministerial agency of the Federal Government.

We quote from *Parker* v. *Richards*, 250 U. S. 235, 39 S. Ct. 442, 63 L. Ed. 954, on page 957:

"It is the agency selected by Congress, and the authority confided to it is to be exercised in giving effect to the will of Congress in respect of a matter within its control. Thus in a practical sense the court, in exercising that authority, acts as a Federal agency; and this is recognized by the Supreme Court of the state. *Marcy* v. *Seminole County*, 45 Okla. 1, 144 p. 611."

By taking judicial knowledge of the geography of the Osage Reservation, now Osage County, this Court will be aided in seeing that Congress was not acting unwisely and that the one percent was really an insignificant part of the amount required to be expended for roads and bridges.

The reservation contains approximately 2300 square miles of land. Straight across at its longest and widest points it is 60 miles long and 60 miles wide. It is considerably larger than the state of Deleware and has one-fourth the land area of the State of Maryland. It is 43 miles from Pawhuska, the county seat, to Ponca City, which borders Osage county on the west, and it is 55 miles from Pawhuska to Tulsa, which borders Osage county on the southeast. $50,000.00 a year for twenty years would not build and maintain one hard surfaced road across the county either way, if there were no streams to be bridged—and as a matter of geographical fact, there are many.

One other suggestion is important.

The Act of April 25, 1940, 54 Stat. 168 (Public Resolution No. 66, 76th Congress [H. J. Res 289]), is an amending act authorizing the State of Oklahoma to continue to collect five percent (the existing rate) of

the gross production of the Osage royalties, but upon the express condition that an additional one-fifth of said sum so paid by the Secretary in pursuance of the Act should be delivered over to Osage County, Oklahoma, at the same time or times as the other payment or payments therein provided for are made to said county, "one-half thereof to be apportioned to a fund to be used by said county only for the construction and maintenance of roads and bridges therein, the other one-half thereof to be used for the maintenance of common schools of said county as provided by law."

Congress here again directed the use of a small portion of the Osage royalties for the construction and maintenance of roads and bridges in Osage county, and added schools as another public benefit for which a small portion of the royalties was to be used.

Under the holding by the Supreme Court of the United States in the case of *British-American Oil Producing Company* v. *Board of Equalization of the State of Montana*, 299 U. S. 159, 81 L. Ed. 94, such an enactment was held constiutional. Yet the same and an additional public use is being made of the royalties.

(b). It Does Not Help The Petitioners To Construe The One Percent Expenditure To Be A Tax

Congress has power to permit the taxation of Indian property.

In *British-American Oil Producing Co.* v. *Board of Equalization of the State of Montana*, 299 U. S. 159, 81 L. Ed. 94, a production tax on oil and gas royalties of the Blackfeet Indians was sustained.

The case of *Choate* v. *Trapp*, 224 U. S. 665, 56 L. Ed. 941, also concedes the power of Congress to permit taxation of Indian property.

By the holding of this Court in the case of *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 81 L. Ed. 1245, it is definitely established that it is wholly immaterial that the other inhabitants of Osage County, Oklahoma, or for that matter, the inhabitants of other counties or states, may have received some benefit from the construction of the roads and bridges from this fund. It is not even required that the Osages receive direct benefit from the tax at all. Of course as a matter of fact they were greatly benefitted. They needed the roads for their own benefit and for the benefit of those with whom they had business transactions and tribal and social relations.

This Court has said that the only benefit a taxpayer was constitutionally entitled to receive was to be derived from "his enjoyment of the privileges of living in an organized society established and safeguarded by the devotion of taxes to public purposes."

Prior to 1921 the Osages had been allotted all of the lands in Osage County, except the townsite, school, and church reservations, and they still owned the lands, except those who had received certificates of competency may have sold some of their surplus lands.

The following if from the syllabus to *New York Rapid Transit Corporation* v. *New York*, 303 U. S. 573, 82 L. Ed. 1024:

"5. Syl. A distinction in legislation is not arbitrary, and so violative of the equal protection clause

of the Fourteenth Amendment, if any state of facts reasonably *can be conceived that would sustain it.*"

Then classification is permissible, if there is any conceivable state of facts on which to base it.

In this instance the Osages owned all of the royalties, and they owned all of the lands, or most all of it. They were developing their minerals. Any one of those things would have afforded a "conceivable" reason for the classification.

The Osages had theretofore paid no taxes on their oil development. They had much land exempted from any sort of taxation. They were receiving the greatest benefit from the construction of roads and bridges.

They were the only members of the class of royalty owners in the county. They were the only class of royalty owners in the county. There were no other royalty owners who could be taxed. There was no other class like them.

There could be no discrimination against them for the money was to be used for the benefit and improvement of their property and for their convenience and pleasure.

Congress may classify, distinguish, and select for the purpose of taxation. See *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 31 S. Ct. 171, 55 L. Ed. 137; *Stebbins* v. *Riley*, 268 U. S. 137, 49 S. Ct. 424, 69 L. Ed. 884; and *Nashville C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 84 L. Ed. 1254.

The producers of the oil were not in the same class as the royalty owners. The producers had to prospect

for, develop, and produce the oil at very great cost; and the lands were not theirs and Osage County was most often not their home. It is a matter of common knowledge that the cost of production of oil is great and that where the production is small the cost exceeds the value of the oil produced, but the Osages received the royalty no matter what the cost of production.

Of course an answer in this case would show additional facts justifying the payment of this 1% from the royalties for roads and bridges but it is assumed that this Court will take judicial knowledge of these historical facts:

1. The Osage Tribe of Indians moved from Kansas to the Osage Nation (now Osage County, Oklahoma), about 1872.

2. The tribal lands including the minerals were conveyed to and held in trust by the United States for the Osage Tribe.

3. The lands were allotted in severalty, but the minerals were reserved and are still held in trust by the United States for the Indians and are to be so held until 1983.

4. Some tribal lands were leased for oil even prior to the time of allotment.

5. Congress has from time to time provided for the use of tribal royalties from oil and gas for the construction of agency buildings, schools, blacksmith shops and the like, and has used their funds for administrative, educational, religious and other purposes.

6. That under authority of Congress 1%, or $1,092,337.17 of the Osage tribal royalties were expended on roads and bridges in the Osage Nation.

7. The homestead allotments were, and still are, exempt from taxes in the hands of the original allottee, and also in the hands of his heirs of one-half or more Indian blood since 1929.

8. The surplus lands were exempt from taxation for three years after allotment.

9. The mineral interest of the tribe and the royalties were entirely exempt from taxation until 1921. Then the State of Oklahoma was authorized to collect a gross production tax on the oil and gas royalties in lieu of all other state and county taxes on the production of oil and gas, and the Secretary of the Interior was authorized to pay to Osage County one percent of the royalties to be used for the construction of roads and bridges in Osage County, and the county was required to account to the Secretary of the Interior for that expenditure.

VIII.
CONCLUSION

The suit of the petitioners is based upon two fundamental errors:

FIRST: In relying literally upon the statement that an officer of the United States may be sued without joining the United States, when the authority under which he is acting has not been legally conferred, without taking into consideration the purpose of the suit or the effect of the judgment to be rendered.

If the purpose of the suit is to secure the rendition of a judgment which would adversely affect the United States, if it should be decided that the authority under which the officer has been acting had not been legally conferred, then obviously the United States is a necessary party before the question can be determined as to whether or not the authority had been legally conferred; certainly before it could be determined that the authority had not been legally conferred and a decision rendered which would affix the United States with liability or adversely affect its substantial interest.

The courts look beyond the nominal parties through the form of the action to determine its real purpose and the effect of any judgment which could be rendered. When that is done in this case it is clearly seen that the United States alone, or possibly the United States and Osage County alone, are vitally concerned.

SECOND: The other fundamental error of the petitioners is in assuming that they can change a commendable fact into a condemned one by merely calling it ugly names. Congress decided that it was assisting to improve the financial, economic, commercial, social, educational and religious welfare of the Osage Indians by spending 1% of their royalty income to help build roads and bridges on their reservation, where they were developing their minerals, where they were living on their tax free homesteads, from where they were sending their children to free public schools and to churches, and where they gathered for tribal and social function and over which roads and bridges they traveled to attend business transactions at their Indian Agency. Coun-

sel for petitioners call that confiscation and spoliation, but they cannot change the fact by calling it something which it clearly is not. There is not a single allegation in the bill from which it can be even inferred in the light of historical facts that such an expenditure was not for the best interest of the Osage Indians and certainly there is nothing from which it can be inferred that the expenditure was either confiscation or spoliation.

Then there is not one single authority cited from which it could possibly be concluded that the assistance in building of roads and bridges on the reservations of the Osage Indians from one one-hundredth of their royalty income under the authority and direction of Congress could be held to be an unconstitutional exercise of power.

The suit is wholly without merit in fact and without foundation in law or equity.

Respectfully submitted,

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